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No. 85.

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SUPREME COURT OF THE UNITED STATES.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, *Plaintiff in Error*,

vs.

T. K. KEARNEY AND J. W. WYSE, COMPOSING THE PARTNERSHIP FIRM OF KEARNEY & WYSE, *Defendants in Error*.

No. ~~XXX~~ 85

BRIEF OF PLAINTIFF IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY, *Plaintiff in Error*,
vs.
T. K. KEARNEY AND J. W. WYSE, COMPOSING THE PARTNERSHIP FIRM OF KEARNEY & WYSE, *Defendants in Error.*
No. 333.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This suit was brought in the United States Court for the Southern District of the Indian Territory, at Ryan, by the defendants in error, Kearney & Wyse, a partnership, against The Liverpool and London and Globe Insurance Company, upon two policies of insurance, which were exactly the same in all matters and form and condition, seeking to recover the sum of $3,500 for a loss alleged to have occurred under and by virtue of said policies. The plaintiffs below, defendants in error, alleged a full compliance with all the conditions precedent to their right of recovery. The defendants, answering thereto, admitted

the issuance of the policies, but interposed a general denial, pleading specially the iron-safe clause of said policies, among other things, to wit:

"IRON-SAFE CLAUSE.—*The assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business was carried on; and in case of loss, the assured agrees and covenants to produce such books and inventory; and in the event of the failure to produce the same this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss.*" (Page 6.)

Further answering, denied that the plaintiffs below kept a set of books, as required by the said iron-safe clause; and further answering that the said defendants in error, plaintiffs below, upon demand being made by the company after loss was claimed to have occurred, for the said books, as required by the policies, refused and failed to furnish the books as required by said policies and necessary for the determination of said loss; and upon the failure of the plaintiffs below, defendants in error, to comply with the terms of the policies in furnishing the said books and keeping the same, as required by the said iron-safe clause,

that the plaintiffs below were not entitled to recover on said policies of insurance.

Upon these issues joined, trial was had on the 23d day of September, 1895. At the trial of the case plaintiffs did not produce as proofs of their loss the set of books, as required by said iron-safe clause, but attempted to prove the amount of their loss by oral testimony, admitting that they had no inventory and that they did not keep a complete set of books, and gave as their reason for not producing the books upon demand by the insurance company for the same after loss, and for the non-production of the same at the trial of this case, that at the time of the fire, and between two and three o'clock at night, the said defendants in error, plaintiffs below, went to their store, opened their iron safe, and took out certain books and carried them away, leaving certain books in the safe; and in their removal of the books from the safe at that time of night they lost the inventory, as required by the said policies, and were unable to furnish it; but that the books they left in the safe were not destroyed by the fire.

Whereupon the court allowed them to prove the amount of their loss and make such proof as they might desire, of their own knowledge, of a loss occurring under the policies on which they were seeking to recover in that action; defendant contending, as the policies provide:

"In the event of the failure to produce the books and inventory this policy shall be null and void, and no suit

or action at law shall be maintained thereon for any such loss."

Defendant (plaintiff in error) demurred to the evidence of plaintiff, and moved a non-suit which was denied, and defendant stood upon the demurrer and motion, introducing no evidence.

Thereupon, defendants in error, by consideration of said court, recovered judgment upon said policies against the plaintiff in error. From this judgment plaintiff in error appealed to the United States Court of Appeals for the Indian Territory, at South McAlester; and on the 14th day of June, 1898, the United States Court of Appeals for the Indian Territory at South McAlester affirmed the judgment of the court below; and on the 25th day of June, 1898, a motion for new trial was filed, heard and overruled, and an appeal was prosecuted to the United States Circuit Court of Appeals, Eighth Circuit.

ASSIGNMENTS OF ERROR.

Now comes the plaintiff in error, The Liverpool and London and Globe Insurance Company, and respectfully alleges that there are in the records and proceedings in this cause the following manifest errors occurring in the United States District Court for the Southern District of the Indian Territory at Ryan, and in the United States Court of Appeals for the Indian Territory at South McAlester, and the United States Circuit Court of Appeals, Eighth Circuit, to wit:

I.

The trial court erred in permitting the plaintiff, T. K. Kearney, to testify as to the value of the goods, wares and merchandise alleged to have been destroyed by fire; that the plaintiff had taken an inventory of the goods, wares and merchandise, but had lost the same, and in permitting the witness to state what the inventory showed the goods, wares and merchandise to be worth on the 1st day of January, 1894, or at any other time, said witness, over the objection of the defendant in the trial court, testifying in respect to these matters as follows:

Q. How many goods did you have? A. Between $10,000 and $12,000.

Q. Had you taken an inventory of your property, your stock at any time? A. Yes, sir, we had.

Q. When had you taken the last inventory?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception by defendant.]

A. About the 1st of January, 1894, as well as I recollect.

Q. Where did you keep that inventory? A. In that safe.

Q. Where is that inventory now? A. I can't tell—lost.

Q. Where was it lost?

[Objected to as incompetent, irrelevant and immaterial. Overruled. Exception by defendant.]

A. Lost it that night.

Q. What did that inventory show was the value of your stock of goods when it was taken 1st of January, 1894?

[Objected to as incompetent, irrelevant and immaterial, not the best evidence. Objection overruled. Exception by defendant.]

Q. Was or was not that a correct inventory of the property at the time it was lost?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception.]

(Pages 11–13.)

All of said testimony being incompetent and inadmissible, for the reason that the policy sued on, among other things, provided that "the assured under this policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of said business; and further covenants and agrees to keep such books and inventory in a securely locked iron safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to fire which would destroy the house where such business is carried on; and in case of loss the assured agrees and covenants to produce such books and inventory; and in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss."

II.

The court erred in permitting the plaintiff, Kearney, to testify as follows:

Q. Mr. Kearney, in either one of these proofs of loss, was the statement attached showing the amount of cash

sales and credit sales and the amount of your purchase from the last inventory taken before the fire?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception by defendant.]

A. Yes, sir. (Page 15.)

III.

The trial court erred in permitting the plaintiff, Kearney, to testify as follows:

Q. Mr. Kearney, did you or not remove the books from that safe on that night?

[Objected to as incompetent, irrelevant and immaterial, and leading, and not proper under the issues in this cause, a waiver not being pleaded. Objection sustained in so far as it is leading.]

Q. What did you do with your books that night the fire took place?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. When I saw we were going to burn, I went into the house, into the store, and got the books out of the safe.

Q. Where was the fire when you went in there with reference to your house? A. It was directly over north, in a house opposite. We were on the south side.

Q. Your house was catching fire? A. Yes, sir, a glass broke out as I went in there.

Q. What was your purpose in removing the books from the safe? A. I wanted to remove the books. I thought it would be better to take them out than to run the risk of leaving them in there.

Q. Did you or not endeavor to get all the books out of the safe and carry them to a place of safety?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. Yes, sir.

Q. Were there any other books lost except the inventory? A. Yes, sir.

Q. Do you remember what other books?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. I think so. An old cash-book, and probably some other old day-book or blotter.

Q. Did you or not intentionally leave that inventory in there, or any book in that room that night? A. I did not.

Q. How large a book was that inventory? A. It was a small book, paper back.

Q. About what was the weight of them, of all the books you had to carry?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues herein. Overruled. Exception.]

A. About 125 pounds.

Q. The number of volumes? A. No, I mean the weight.

Q. Were there a number of books? A. Yes, sir, a number of them.

By the Court: When did you first miss this book, or discover you had lost it? A. When the safe was opened after the fire.

By the Court: Did you close the safe after taking the books out? A. I just shut the door. I don't remember whether I bolted it or not.

By the Court: Did you have other books left on the inside? A. Yes, sir.

By the Court: Were they preserved? A. Yes, sir.

Mr. Cruce: What was the condition of the books left in the safe? A. We had an old book there that the back was slightly burned.

Mr. Cruce: We now offer in evidence the proofs of loss, and ask to read them to the jury.

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. They have not shown that the original cannot be produced. Objection overruled. Exception by defendant, and proof of loss read to the jury.] (Pages 15–17.)

All of said evidence being incompetent and inadmissible under the issues made by the pleading in the case and under the provisions of the policy sued on above quoted.

IV.

The trial court erred in permitting the witness, Kearney, to testify as follows:

Q. What effort was made to adjust the loss?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case, as no waiver was pleaded. Objection overruled. Exception.]

Q. State to the jury what effort was made between you and Mr. Van Valkenburgh to adjust this loss.

[Same objection and ruling as above.]

A. He had Mr. McCoy to make up a statement. I helped him. We went to the book and the statement was rendered to Mr. Van Valkenburg, and I had a meeting with him and we tried to adjust it (at least I tried).

Q. What did he do? A. He made a proposal.

[Defendant objected to any proposal of compromise, as that forms no part of the issues in this case.] (Page 17.)

V.

The trial court erred in permitting the plaintiff, T. K. Kearney, on direct examination to testify as follows:

Q. About what was the value of the stock of goods in the wareroom?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues herein.]

Q. At the date of the fire, I mean?

[Same objection—not the best evidence. Overruled. Exception.]

A. I suppose about $4,000.

Q. Those in the wareroom? A. Yes, sir.

Q. About what do you estimate for the value of the goods in the brick building?

[Objected to as incompetent, irrelevant and immaterial, and not proper under the issues in this case. Overruled. Exception.]

A. About $8,000. (Page 24.)

VI.

The trial court erred in permitting said witness, Kearney, to testify as follows:

Q. You agreed in this iron-safe clause that you would keep these books and inventory in the fireproof safe at night, and at all times when the store mentioned in this policy is not actually in use, or that you would keep them in some secure place from a fire which would destroy the house. Where did you take these books after you removed them that night?

[Objected to as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.]

Q. Where did you take these books to? A. Took them to my house.

Q. Was that property destroyed that night? A. No, sir; the fire didn't reach that far.

Q. This slip of paper containing the iron-safe clause—is that part of your policy, or is it a slip of paper different attached to your policy?

[Objected to as incompetent, irrelevant and immaterial.]

Q. Is that slip of paper a part of that policy? Was that iron-safe clause in the original policy, or is it a slip of paper attached to it?

[Same objection. Overruled. Exception.]

A. It is the paper attached to it.

Q. Is that slip of paper in fine or large print? A. Fine print.

(Pages 24, 25.)

VII.

The trial court erred in permitting the witness, Kearney, to testify as follows:

Q. You had another book that did show the credit sales? A. Yes, sir.

[Objected to as incompetent, irrelevant, and immaterial and leading. Objection sustained in so far as it is leading.]

Q. Is it not a fact that you keep a book showing the total sales, and that you could tell the total sales?

[Objected to as unfair and leading. The books are the best evidence. He can produce the books and explain what the books show.]

By the Court: He had a right to re-examine him upon any matter brought out.

Q. Are you an expert bookkeeper? A. No, sir.

Q. Is Mr. Wyse? A. No, sir.

[Question and answer objected to as incompetent and immaterial.]

Q. What is the truth, Mr. Kearney, as to whether or not these books you have here (I don't mean whether one book shows specifically the amount) show the total amount of cash sales?

[Objected to as leading.]

Q. What is the truth as to whether or not the books you have there show the total amount of cash sales and credit sales from the time of the last inventory to the time of the fire? A. They did.

Q. They do? A. Yes, sir. (Page 25.)

Said testimony being incompetent and inadmissible, because it does not show a compliance with the clause of the policy sued on above quoted.

VIII.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Had you taken an inventory of that stock of goods? A. We had taken an inventory, I think, about a year previous to the fire.

Q. About what time? A. About January 1st.

[Question and answer objected to by the defendant as incompetent, irrelevant and immaterial, and not proper under the issues in the case to attempt to prove that an inventory was taken. Overruled. Exception taken.]

Q. Where is that inventory now? A. I don't know.

Q. Do you know how it got lost or destroyed? A. Yes. It was destroyed in the fire, I suppose.

Q. Are you able to produce the inventory now? A. No, sir.

Q. What was the value of your goods as per that inventory?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence and improper under the issues. Overruled. Exception.]

A. About $9,000, I think. (Page 27.)

IX.

The trial court erred in permitting J. W. Wyse, one of the plaintiffs, to testify as follows:

Q. Now, Mr. Wyse, what was the value of the goods in the brick house that night that they were destroyed by fire?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. Overruled. Exception.]

A. About $8,000.

Q. About what was the value of the goods in the warehouse?

[Same objection and ruling. Exception.]

A. About $4,000.

All of said testimony being inadmissible, because it does not show a compliance with the provisions of the policy above quoted. (Page 28.)

X.

The trial court erred in permitting J. W. Wyse to testify as follows:

Q. Did or not that statement show Mr. Van Valkenburg the amount of your cash sales and your credit sales during the time since the last inventory?

[Objected to as incompetent, irrelevant and immaterial, and not the best evidence. The books are the best evidence. Overruled. Exception by the defendant.]

Q. What is the truth as to whether or not he had a statement of that kind made by Mr. McCoy? A. He had the statement made.

Q. Do you know where that statement is? A. No, sir. We never had it after it was made.

Q. It is in their possession? A. Yes, I suppose so.

[Question and answer objected to as incompetent, irrelevant and immaterial. No effort made by plaintiff's counsel to procure the original, if there was such. No demand made.]

Q. What is the truth as to whether or not you made a demand upon the insurance company? A. We made demand.

Q. Did they produce it?

[Objected to as incompetent, irrelevant and immaterial. An oral demand is not contemplated by the statutes. Overruled. Exception.]

A. No, sir.

Q. Now, Mr. Wyse, when did the local agent for the company, Mr. Mays, ascertain that your goods were destroyed by fire? A. While the fire was burning he was there.

Q. When did you first talk to him about the loss?

[Objected to as incompetent, irrelevant and immaterial. Objection overruled. Exception taken.]

A. While the fire was burning. (Pages 28, 29.)

XI.

The trial court erred in refusing to strike out the two answers of the witness, J. W. Wyse, on the re-direct examination, on page 34 of the transcript in this case, as follows:

Q. I believe you made a (stated you made a) state-

ment to R. G. Dun & Company from this inventory. Is that correct? A. Yes, sir.

Q. Since the fire have you sent to R. G. Dun & Company for a copy of it? A. Yes, sir.

XII.

The trial court erred in a statement to the jury as follows:

"The principal question you are called upon to determine in this case, and about the only question—material question of fact—is, whether under this policy the plaintiffs Kearney & Wyse have in the *main* complied with the terms of the policy." (Page 74.)

XIII.

The court further erred in making the statement to the jury found on pages 65 and 66 of the record, which is as follows:

"Under the exact terms of the policy—and the exacting terms of it, I may add—they were required to keep a complete set of books, by which they could exemplify every day's transactions of their business; and they were required to keep a book containing an inventory last made by the plaintiffs before the fire. They have produced a set of books, an explanation of which you have heard made by the plaintiffs, *and seems* to be substantially in compliance *with the terms of the policy upon that subject.*"

XIV.

The trial court erred in charging the jury in its instructions in chief as follows, to wit:

"Now, if they [plaintiffs] had been guilty of negligence

in the discharge of their duty, in the discharge of the obligations imposed by the policy, they would not be entitled to recover, and that is a question you must pass on. It is contended by the plaintiffs that when the fire was on, a great fire, sweeping a whole town out of existence, in order to protect their records and books in accord with the obligations which this policy imposed upon them, they opened the safe and took from it all the books relating to the business, if it was in the safe, and in taking it out, it was lost in the excitement and destroyed. You are instructed that the loss or destruction of that book, and the failure to produce it would not in itself defeat the recovery. If there was a fraud perpetrated in its loss or destruction, or the parties were guilty of any negligence, or a sufficient want of care under the circumstances, when the book was lost, that would be sufficient to defeat a recovery; but if they acted in good faith, with the use of diligence and care that business men usually employ, the loss of that book, under the circumstances, would not defeat a recovery, but they would be entitled to recover." (Page 66.)

XV.

The trial court erred in its charge in chief in instructing the jury as follows:

"Now, if the plaintiffs kept such books and inventory locked in a fire-proof safe on the night that the goods were destroyed by fire, and the plaintiffs, for the purpose of better protecting said books and inventory, attempted to remove them to some other secure place not exposed to a fire that would have destroyed the house in which the business was operated, and in such effort, any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy." (Page 67.)

XVI.

The trial court erred in refusing to give the following instruction, requested by counsel for defendant:

"I instruct you, gentlemen of the jury, under the evidence in this case, plaintiffs are not entitled to recover, and your verdict must be for the defendant."

(Page 68.)

XVII.

The trial court erred in refusing to give the jury the following instruction, requested by the defendant:

"I instruct you, gentlemen of the jury, that the policy sued on in this action, No. 10,292, for the sum of $2,500, contains the iron-safe clause, which provides, among other things, that 'the insured under the policy hereby covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and on credit, together with the last inventory of said business, and covenants and agrees to keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in the policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house in which such business was carried on; and in case of loss, the assured agrees to produce such books and inventory; and in the event of failure to produce the same, the policy shall be null and void, and no suit or action at law shall be maintained thereon for any such loss.' I further instruct you that this clause of the policy is a warranty on the part of the assured, and his failure to meet the requirements of said warranty in any particular avoids the policy; and a failure by the assured to produce in a case of loss the inventory as required by said warranty

would defeat the plaintiff's right of recovery, and said policy would be null and void." (Page 68.)

XVIII.

The trial court erred in refusing to give the jury the instruction, the same as the last above mentioned, in reference to the other policy sued on, in the case No. 10,348.

XIX.

The trial court erred in overruling defendant's motion for a new trial. (Page 69.)

XX.

The plaintiff in error, The Liverpool and London and Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States Court of Appeals for the Indian Territory, and now here alleges that the said United States Court of Appeals for the Indian Territory and the United States Circuit Court of Appeals of the Eighth Circuit erred in overruling the first assignment of error set out above.

XXI.

The United States Court of Appeals for the Indian Territory erred in holding "That a strict compliance with the conditions of the iron-safe clause was not required, but if there is a substantial compliance with these covenants the assured will be entitled to recover. (*Brown v. Palatine Ins. Co.*, 35 S. W. 1960.)"

The same is not the law of this case, and the authority referred to does not decide what the court claim for it.

XXII.

The United States Court of Appeals for the Indian Territory erred in overruling the 2d assignment of error presented therein, being the 14th assignment of error set out above.

XXIII.

Because the court erred in refusing to consider the other assignments of error presented in said United States Court of Appeals for the Indian Territory.

XXIV.

The United States Court of Appeals for the Indian Territory erred in wholly disregarding the 16th assignment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested; and also in wholly disregarding the 19th assignment of error, and in the ruling of the court below in overruling defendant's motion for a new trial. Under the first of these assignments of error the plaintiff in error undertook to question the sufficiency of the evidence to sustain the verdict and judgment in this case, and in the 19th assignment of error the plaintiff in error undertook to question the action of the court below in overruling the motion for a new trial.

XXV.

Because the court erred in its order made on the 25th day of June, 1898, overruling the motion of plaintiff in error for a rehearing in said cause.

XXVI.

The plaintiff in error, The Liverpool and London and Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States Court of Appeals for the Indian Territory, and now here allege that the said United States Court of Appeals for the Indian Territory erred in overruling the first assignment of error set out above.

XXVII.

The United States Court of Appeals for the Indian Territory erred in overruling the second assignment of error presented therein, being the 12th assignment of error set out above.

XXVIII.

Because the court erred in refusing to consider the other assignments of error presented in said United States Court of Appeals for the Indian Territory.

XXIX.

The United States Court of Appeals for the Indian Territory erred in wholly disregarding the 14th assign-

ment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested, and also in wholly disregarding the 17th assignment of error, and in the ruling of the court below in overruling defendant's motion for a new trial was requested. Under the first of these assignments of error the plaintiff in error undertook to question the sufficiency of the evidence to sustain the verdict and judgment in this case, and in the 17th assignment of error the plaintiff in error undertook to question the action of the court below in overruling the motion for a new trial.

XXX.

Because the court erred in overruling its order made on the 25th day of June, 1898, in overruling the motion of plaintiffs in error for a rehearing in said cause.

XXXI.

The plaintiff in error, The Liverpool and London and Globe Insurance Company, respectfully shows that the foregoing assignments of error are in substance and effect the same assignments of error presented to the United States Court of Appeals for the Indian Territory and to the United States Circuit Court of Appeals for the Eighth Circuit in St. Louis, Missouri, and now we allege that the said United States Court of Appeals for the Indian Territory and the United States Circuit Court of Appeals for the Eighth Circuit erred in overruling the first assignment of error as set out above.

XXXII.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the ruling of the United States Court of Appeals for the Indian Territory and in overruling the second assignment of error presented therein, being the twelfth assignment of error set out above.

XXXIII.

That the United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to consider the other assignments of error presented in the United States Court of Appeals for the Indian Territory.

XXXIV.

The United States Court of Appeals for the Eighth Circuit erred in wholly disregarding the fourteenth assignment of error, wherein the action of the court below in refusing to instruct the jury to find for the defendant was requested.

XXXV.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the order of the United States Court of Appeals for the Indian Territory in overruling the seventeenth assignment of error and sustaining the ruling of said court in overruling defendant's motion for a new trial.

XXXVI.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the charge of the trial court to the jury, as set forth in assignment of error XII, herein.

XXXVII.

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the ruling and instructions of the trial court to the jury, as set out in assignment of error XIII herein, which was as follows:

"Now, if the plaintiffs kept such books and inventory locked in a fire-proof safe on the night the goods were destroyed by fire, and the plaintiffs, for the purpose of better protecting said books and inventory, attempted to remove them to some more secure place not exposed to a fire that would have destroyed the house in which the business was operated, and in such effort any part of the books were destroyed, plaintiffs were acting within the scope of authority granted them by the iron-safe clause of said policy."

The United States Circuit Court of Appeals for the Eighth Circuit erred in sustaining the refusal of the trial court to give the jury the instructions requested by the defendant, as set forth in the 15th assignment of error herein.

XXXIX.

The United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the judgment of the United States Court for the Indian Territory and of the United States Court of Appeals for the Indian Territory.

XL.

The United States Circuit Court of Appeals for the Eighth Circuit erred in disregarding each and all of the assignments of error herein set out, the same being the same as filed in the United States Circuit Court of Appeals and the United States Court of Appeals for the Indian Territory.

XLI.

The United States Circuit Court of Appeals erred in rendering judgment for the respondents, T. K. Kearney and J. W. Wyse, partners as Kearney & Wyse, against The Liverpool and London and Globe Insurance Company, appellants.

XLII.

The United States Circuit Court of Appeals for the Eighth Circuit erred in ordering and adjudging that the judgment of the United States Court of Appeals and the judgment of the United States Court for the Southern District of the Indian Territory be affirmed, with costs.

(Pages 123 to 134 inclusive, Transcript of Record.)

ARGUMENT.

I.

Three courts have passed upon the question in this case, each one assigning a different reason for its decision, and none of them sound. To the rules governing the construction of written contracts the greatest violence was done by the United States Circuit Court of Appeals, Eighth Circuit, by a divided court holding in effect that a party would be relieved from compliance with his part of the contract unless the other party to the contract could show and prove fraud in his failure to comply. That no one need comply with the terms and conditions of a contract by him to be performed in order to receive the benefits of the contract unless he was guilty of fraud, which the other party to the contract would have to prove.

The real question in this case is raised by the statements and instructions of the trial court under assignments of error 12, 13, 14, 15, which is, whether the iron-safe clause of the policies of insurance sued on in this action is a promissory warranty and must be strictly complied with or not; and under the instructions and rulings in this case it would be immaterial whether the claim had been made that from the facts shown a strict compliance

with the conditions of the policy was had by the insured, defendants in error, as that test of the question was taken out entirely by the statements and instructions by the court to the jury; it being admitted by the defendants in error and by the instructions of the court, that a strict compliance with the terms of the policy had not been made by the insured, in that they failed to keep a set of books as required by the policy, and absolutely failed to produce them. And in this case defendant introduced no evidence, but relied entirely upon the evidence of the plaintiffs, under proper construction of the policy, to defeat their recovery; and we will insist that there was not a substantial compliance, as a proposition of law, by the insured with the conditions of the policy. The policy provided, in brief:

That the insured should keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and credit, together with the *last inventory* of said business; and further covenants and agrees to keep such books and inventories securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss by fire the assured agrees and covenants to produce such books *and inventory;* and in event of failure to produce the same, this policy shall be null and void, and no suit or action at law shall be maintained for any such loss.

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That they did not keep a set of books as required by the policy, is clearly shown by the evidence; but this we will discuss later on. The books that they did keep were kept in an iron safe, as shown by the evidence, until the night of the fire; and upon the night of the fire, between two and three o'clock at night, they went to the safe and took out some of the books and carried them away, leaving the door of the safe open and leaving some of the books in the safe. The books left in the safe were not destroyed by the fire, even when the door was left open; but in carrying the books away they claim they lost the very books required to be kept by the policy, and therefore could not produce them. This is their undisputed testimony; and the question arises, even under the instructions of the court, Was this a substantial compliance with the terms of the policy? Whose fault was it that the books were lost or destroyed in taking them away from the safe at that time of night? If the insured attempted to act contrary to the terms or conditions of the policy, or do anything more than was required by the terms and conditions of the policy, they must certainly be held to have assumed all risk and liability that would flow from their acts, regardless of what their intention might have been. They were forbidden, by the terms of the policy, from removing or attempting to remove, for any reason, the books from the place where they were designated and required to be kept after business hours; and should they

exercise their judgment as to which should be the better place, at that time of night, they are then violating the terms of the policy and must assume the risk for so doing.

Nothing can prove this proposition stronger than the facts as they state them to be: that the books left in the safe were not destroyed by the fire, even though the door was left open. They had their choice, and warranted to either keep those books in an iron safe or some other place equally secure; and when they selected the iron safe and placed them in there at the close of business that day they had no right, under the terms of the policy, to exercise their judgment over the control of those books during the night-time or until the next day; and if they had left them in the safe, as the policy required, they would have complied strictly with the terms of the policy and could have produced the books for examination, and proofs of loss in this case. When they assume to go to the store at two or three o'clock at night and remove the books from the safe, where they had warranted to keep them, without the knowledge or consent or approval of the company, they then assume all risk and liability that must naturally flow from their acts in so doing; and having admitted by the evidence that under these circumstances, moving the books from the safe at that time of night, they lost and destroyed the books, and were thereby prevented from producing them as proofs required by the policy,

they cannot make the company assume the responsibility or any part of the same for the loss of such books, but must assume it themselves, and therefore it is not a substantial, even under the instructions of the court, compliance with the terms of the policy.

But we insist that a substantial compliance with the terms of the policy or the iron-safe clause, as set out above, is not a correct proposition of law; but that it is a promissory warranty, and must be strictly complied with within the meaning of the decisions of the court in 38 Federal Reporter, page 21, where the court say:

"But after the business of the day is over and there is no longer occasion to use the books, and the store is closed for the night, there is no hardship in requiring that they shall not be left to the hazard of destruction by fire."

In that case, however, the store had not been closed for the night, and this court held it a strict compliance; but in this case the question upon which the decision in the case of *Jones v. Southern Insurance Company*, 38 Federal Reporter, page 21, was based, does not arise, for the reason that the store was closed for the night and business at an end, and they did not have, according to the customs of merchants or any custom, a right to remove the books from the same, because they were in a fire-proof safe, right where they should be to be properly guarded and protected against fire. The Supreme Court of Arkansas, Vol. 61, Ark. Re-

ports, page 213, has placed the same construction upon the decision above referred to, that we have given when they say:

"The covenant to keep the books in a fire-proof safe at night or in some place secure from fire was recognized as valid and binding; but it was said that the proper construction of that clause was not that the books shall be kept in a safe from sunset to sunrise, but they shall be so kept from the time the business of the day is ended and the store closed for the night. This construction did no violence to the clause of the policy by which the assured obligated himself to keep his books in a fire-proof safe at night," etc.

The court further deciding (page 214):

"The object and meaning of the clause of the policy under consideration is, we think, free from doubt. It in effect stipulates that the assured shall keep his books in a fire-proof safe, not only at night, but at all other times when the store is not actually open for business. The object in requiring a set of books to be kept, showing a record of the business transacted, and of the changes taking place from day to day in the stock of goods assured, is very patent. Without such a record the insurer has no means of ascertaining the amount or value of the goods destroyed and for which he is liable. Making such a record is of no value unless it can be preserved from the fire that destroys the property. To guard against this the appellee in this case covenanted that he would keep such books securely locked in a fire-proof safe at night and at all times when the store mentioned in the policy was not actually open for business, and that in case of loss he would produce the books."

The court further citing 58 Ark. 575, *Western Assur-*

ance Co. v. Altheimer, where the court said, speaking of this provision:

"The stipulations of the iron-safe clause constitute an express promissory warranty in the nature of a condition precedent, and that a strict compliance with it was necessary. Quoting 1st Wood on Fire Insurance, page 448."

In 18th Insurance Law Journal, page 813, the court held:

"A clause in a policy of fire insurance that the commercial books of the assured shall be kept in an iron safe at night is a promissory warranty, and a failure to comply with it will avoid the policy. A partial compliance by putting some of the books in an iron safe is insufficient. Where the assured fails to comply with this condition and his books are destroyed by fire, so that the amount of his loss cannot be proved by his books, he can make proof in no manner. It is incompetent for the court to determine whether or not the promissory warranty is material or immaterial; it suffices that the parties have made the agreement, and they must be held strictly to it."

We insist that it can make no difference what may have been the intention of the insured in removing these books from the safe at night. Their agreement was to keep them in a fire-proof safe at night, or some other secure place for the purpose of producing them, and they warranted to do this. The fact is, and they admit it, that they did not keep these books in such a secure place that they could produce them. And it is just the same, as far as the purpose is concerned for which they desired these books, and for which they warranted to produce them,

whether they tried, with best intentions, in removing them from the safe, to preserve them; that was a matter they should have passed judgment on before—of whether the safe where they had the books at the time of the fire was a fire-proof safe or not. They did not produce these books. They did not keep them in a fire-proof safe or some other equally secure place, and they were therefore destroyed at night and after business hours. And why they were not kept as required by the policy is a matter that they must stand responsible for.

In 30 S. W. Rep., page 384, *American Fire Ins. Co. v. First National Bank*, in construing the iron-safe clause the court say:

"If the party referred to signed a part of the contract of insurance and was by its terms made a condition necessary to be complied with before recovery should be had, the court should have so instructed the jury."

Kelley-Goodfellow Shoe Co. v. Liability Ins. Co., 28 S. W. Rep. 1027, (Texas).

Again, the Supreme Court of Arkansas, in the case of *Western Ins. Co. v. Altheimer Bros.*, 25 S. W. Rep. 1069, (and the laws and decisions of Arkansas govern and control the Indian Territory,) says that—

"The stipulations of the iron-safe clause constitute an express promissory warranty and of the clause as to ownership an affirmative warranty. They were in the nature of conditions precedent to a recovery, and a strict compliance with their terms is necessary according to the intent and

understanding of the parties. (Wood Ins., §§ 179, 449; May Ins., §§ 156, 157; Ang. Ins., 140; Ellis Ins., p. 28; 1 Arn. Ins., 213; 3 Kent Com., [12th ed.,] p. 289; *Wood v. Ins. Co.*, 13 Conn. 533; 1 Wood Ins., p. 436.) It follows that the first instruction of the court which told the jury that 'if the plaintiffs have substantially complied with the terms of the policy, they should recover,' is erroneous."

The trial court in this case not only told the jury, by its instructions, that 'if they had substantially complied with the terms of the policy they were entitled to recover, but further said to the jury (page 77 of Record):

"They have produced a set of books, an explanation of which you have heard made by the plaintiffs, and which seem to be substantially in compliance with the terms of the policy upon that subject."

Thereby practically leaving nothing for the jury to do but to return a verdict for the plaintiffs, defendants in error.

Further, the United States Court of Appeals for the Indian Territory, at the bottom of page 101 and at the top of page 102, say, in their decree:

"This court is of the opinion that a strict compliance with the conditions of the iron-safe clause is not required; but if there is substantial compliance with these covenants, the assured will be entitled to recover. (*Brown v. Palatine Insurance Company*, 35 S. W. Rep. 1060.)"

The court relied upon the decision of the Supreme Court of Texas in *Brown v. Palatine Insurance Company*. And

yet we find, upon an examination of this case, that the question decided by the court was not decided in that case at all. The Supreme Court of Texas state, in that case:

"It is, however, unnecessary for us to discuss the question as to whether compliance must be strict or may be substantial; for in the case now before us the real question is, What did the parties intend to prescribe as the measure of duty on the part of the insured in keeping his set of books?"

We insist that in the case of *Brown v. Palatine Insurance Company*, Supreme Court of Texas, the iron-safe clause was not construed at all. They however affirm in that case the rule laid down in *Goddard v. Ins. Co.*, in 67 Texas, page 71, but expressly state that they did not decide, and that it was unnecessary to decide, whether a strict or a substantial compliance with the iron-safe clause should be given. We adopt the views of Justice SANBORN in his dissenting opinion, as follows:

SANBORN, Circuit Judge, dissenting: "Is opening a fire-proof safe in one's place of business in which a book is securely locked, and either taking the book and losing it, or leaving it in an open safe, so it is burned up by an approaching fire which destroys the building in which it is situated, the performance of an agreement to keep the book securely locked in a fire-proof safe or in some secure place, not exposed to a fire which would destroy the one where such business is carried on? The opinion of the majority answer this question in the affirmative. I have been unable to resist the conclusion that it should be answered in the negative. The book certainly was not kept 'securely locked

in a safe,' nor was it kept 'in some secure place, not exposed to a fire which would destroy the house where such business is carried on.' On the other hand, the safe was unlocked, and the book was either lost or was actually exposed in the open safe or elsewhere to the fire which burned the house where the business was conducted, and was thereby destroyed. Is losing a book keeping it? Is exposing it to a fire by which it is destroyed, keeping it in some secure place not exposed to that fire?

"It is said that the insured had the option to keep the book securely locked in the safe or in some secure place not exposed to a fire which would destroy the business house, that this was a continuing option, and that they complied with their contract if they lost the book in transit in the night while they were attempting to exercise this option, and to take it from the safe to another secure place. But is this argument sound? The contract was that 'at night and at all times when the store mentioned in the within policy is not actually open for business' they would keep the book locked in the safe or in some secure place not exposed to a fire which would burn the building in which the safe was situated. It was that they would keep the book in one of two secure places during all of every night while the store was closed. It was not that they would keep it in one of those places or in transit between them. They undoubtedly had the right each day to choose in which place they would keep their book during the coming night, but, after the night had come and after the store was closed, if they took the book from the place which they had selected, and exposed it to the fire against which they had agreed to guard it, I see no escape from the conclusion that they violated their contract, because they no longer kept it in either of the secure places specified, and this, whether they removed it with the intention of transferring it from

one place to the other, or with some other purpose. They were not keeping it in either place while they were transferring it from one to the other. The contention of the majority here proves too much. If the insured could exercise their option once during the night, and after the store was closed, and expose the book to the danger of fire, they could exercise it many times, and could thus keep the book continually in transit and in neither of the safe places where they agreed to have it during the entire night. In my opinion, an agreement to keep an article in one of two specified secure places during certain hours of the night is not performed by losing it in transit between them during those hours.

"There is another proposition of the majority to which I cannot yield assent. It is, that an agreement to safely keep and to produce a book upon the trial of a lawsuit is not broken by a failure to keep and produce it, unless that failure is due to a wrongful or fraudulent act, or to the culpable negligence of the defaulter. The agreement of the insurer here was as clear and unambiguous as the English language could make it. It was that they would keep the inventory securely locked in the safe or in the other secure place specified each night, that they would produce it in case of a loss under the policy, and that, if they failed to do so, no action upon the policy should be maintained. They failed to keep it in either of the places named in the agreement, and they failed to produce it. It is said, however, that they never meant to agree to keep it or produce it; that they only intended to contract that they would not by any wrongful or fraudulent act or by any culpable negligence of theirs fail to keep and produce the book, that the contract should be construed according to this latter intention, and that, as the insurance company failed to prove any such fraudulent act or culpable

negligence of the insured there was no evidence of a breach of the agreement, although the defendants in error utterly failed to do the acts which by the plain terms of the written contract they agreed to perform. But there is no evidence of the intention of the parties to this contract except the policy itself. The policy contains no agreement that the defendants in error will not be guilty of fraudulent or wrongful acts or of culpable negligence in their care of the book. It nowhere mentions these terms or makes any reference to the subjects which they suggest. It is only a bald, plain contract to keep the book in one of the places specified, and to produce it. The terms of this agreement seem to me too plain for construction. In my opinion, they bring these cases under the familiar rules that 'where the parties have deliberately put their engagements into writing in such terms as to import a legal obligation without any uncertainty as to the object or extent of such an engagement, it is conclusively presumed that the whole engagement of the parties, and the manner and extent of their undertaking was reduced to writing.' (*Thompson v. Libby*, 34 Minn. 374, 377; *Barnes v. U. P. Ry. Co.*, 54 Fed. 87; 4 C. C. A. 199; 12 U. S. App. 17; *Wilson v. U. S. Cattle Ranch Co.*, 73 Fed. 994; 20 C. C. A. 244; 36 U. S. App. 634, 643,) and that, 'contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.' (*Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 463; *Fred J. Kiesel v. Sun Ins. Office of London*, 88 Fed. 246.)

"Under these rules I am unable to find anything in this contract to indicate that the parties to it intended to make any other agreement than that which it so clearly expressed.

Would it be any defense to an action upon an absolute promise to pay a debt that the debtor only intended to agree that he would not be guilty of any fraudulent act or culpable negligence which would prevent him from paying it and that he had not been? Would it be the province of the court, in the absence of other evidence, to construe a contract to build a house, to dig a well, to sell a horse, or to do any other act, into an agreement not to commit any fraudulent act or culpable negligence which would prevent the performance of the contract? The rule that courts may not make new contracts for parties which they never considered, and to which their minds never assented, answers these questions. The same rule seems to me to apply to an unconditional agreement to keep in a specified place and to produce a book. I can find in such a contract no evidence that the parties to it intended to make any other agreement. I am unable to see in it any proof that they intended that the insured should not agree to keep and produce the book, but that they should merely contract not to commit any fraudulent act or culpable negligence that would prevent them from keeping and producing it. The latter contract seems to me to be in the teeth of the former. It destroys the written agreement, and I cannot persuade myself, in the face of its plain terms, that the minds of these parties ever met on a contract to so effectually abrogate it.

"If this is the correct view of the meaning of this contract, it is immaterial whether its breach was caused by mistake, carelessness, from culpable negligence, or by an honest purpose to violate the agreement. By the terms of the agreement, the insured voluntarily took upon themselves the chances of the effects of their own imprudence, carelessness, purpose and performance. The record conclusively shows that their failure to perform their con-

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tract was not caused by any act of God, or the public enemy, or by the interposition of any force which made it impossible for them to fulfill it. The breach is therefore without legal excuse, and its inevitable consequence follows. The agreement was that no action should be maintained upon the policies if the book was not kept and produced. It is conceded on all hands that it was not kept and that it was not produced, and in my opinion, the insured were estopped by their agreement and by this fact from maintaining any action upon the policy. This view of the meaning and effect of the 'iron-safe clause' of policies of insurance is sustained by the following authorities. They hold that it is 'an express promissory warranty in the nature of a condition precedent,' and that a strict compliance with its terms is indispensable to a recovery upon a policy which contains it. *Western Assurance Co. v. Altheimer*, 58 Ark. 565, 575; *Southern Ins. Co. v. Parker*, 61 Ark. 207, 215; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 27 S. W. (Texas) 1027, 1031; *American Fire Ins. Co. v. First Nat. Bank*, 30 S. W. (Texas) 384, 385; Ostrander on Insurance, sec. 238; and *Landmann v. Hartford Fire Ins. Co.*, 18 Insurance Law Journal (La.), 813, 815, in which the court pertinently said: 'In this case there is no room for interpretation or construction; the language used in expressing the clause is free from ambiguity. It is printed in large type, annexed to the face of and is clearly a part of the policy. Its purpose was to enable the company, in case of loss, to procure satisfactory evidence of the extent of the loss, to protect it against unfounded augmentation of the value of the property destroyed and to enable it to obtain other evidence than that of the assured and his employees, however honest and correct they may be, of the damage sustained. Its purpose was, also, to enable the assured to make his loss

mathematically certain, and protect him against unfounded deductions. It was the plain intention of the parties that in case of loss, the books were to be the basis of the adjustment, and to enable them to be produced it was made a part of the policy that they should be kept in an iron safe.

" 'This the assured promised to do. The iron-safe clause in the policy is a promissory warranty. Being a warranty, a part of the contract, it is in the nature of a condition precedent to a right of recovery, and the parties whose rights are dependent upon such a condition must show they have performed it. "Agreements legally entered into have the effect of laws on those who have formed them." (R. C. C., art. 1901.)

" 'The court cannot add to or detract from the law they have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it, however foolish, improvident, or immaterial it may be.' "

We ask the court to consider the first, third, sixth, eighth and ninth assignments of error, together with the exceptions embraced in these assignments relating to the admissibility of the testimony of the plaintiffs, showing that some time before the fire they caused to be made an inventory of their stock of goods, and that on the night of the fire Mr. Kearney went to the safe and removed therefrom the small book containing the last inventory of the merchandise, together with other books, but that the book containing the inventory was lost and probably destroyed by fire, and that the inventory showed that the goods destroyed were of the value of about $9,000. By

the introduction of this testimony the provisions of the iron-safe clause in the policy were practically annulled. Plaintiffs were relieved of all obligation on their part to comply with the policy, although the policy sued on bound the plaintiffs, as a condition precedent to a recovery, to keep a set of books showing a complete record of the business transactions, together with the last inventory of their business; and further covenanted and agreed to keep such books and inventory in a securely locked iron safe at night; and in case of loss, the assured covenanted and agreed to produce such books and inventory; and in the event of their failure to produce the same, the policy sued on should be deemed null and void, and no suit or action at law should be maintained thereon for any such loss.

No effort was made to produce lost inventory.

In the case of *Imperial Ins. Co. v. Coos*, 151 U. S. 452, the United States Supreme Court say:

"It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been attempted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts cannot make a contract for the parties. Their duty or function consists simply in enforcing and carrying out the one actually made."

The contract actually made in this case was that Kearney & Wyse should produce the last inventory of their

stock in case of loss. It was rank carelessness and misjudgment on the part of Mr. Kearney to undertake to remove his books from the iron safe where he had agreed to keep them after his building was on fire. The question of his intention or good faith in his effort to remove them does not relieve him from his failure to comply with the agreement. A false fire alarm might have been sounded on the night before, or a week before, or a month before his stock was destroyed, and fearing that the fire would destroy his stock, he might have undertaken to remove his books from the safe and lost the inventory. His failure to produce it in that case would be the same as in this case. He has totally failed to produce any inventory. It is not a question of partial or substantial compliance with this important condition in the policy.

In Ostrander on Insurance, second edition, pp. 655 and 656, quoting from a Louisiana case, where it appeared that on the night of the fire, the plaintiff's son and clerk were at work on the books before the fire occurred, about 12 o'clock at night, and went to bed without putting the books on which they had been working in the iron safe as required by the insurance policy sued on, it is said:

"In this case there is no room for interpretation or construction. The language used in expressing the clause is free from any ambiguity. It is printed in large type, annexed to the face of, and is clearly a part of the policy. Its purpose was to enable the company, in case of loss, to procure satisfactory evidence of the extent of the loss, to

protect it against unfounded augmentations of the value of the property destroyed, and to enable it to obtain other evidence than that of the assured and his employees, however honest and correct they may be, of the damage sustained. Its purpose was also to enable the assured to make his loss mathematically certain, and protect him against unfounded deductions. It was the plain intention of the parties that, in case of loss, the books were to be the basis of adjustment, and, to enable them to be produced, it was made a part of the policy that they should be kept in an iron safe. This the assured promised to do. The iron-safe clause in a policy is a promissory warranty. Being a warranty, a part of the contract, it is in the nature of a condition precedent to a right of recovery, and the party whose rights are dependent upon such a condition must show that he has performed it. 'Agreements legally entered into have the effect of laws on those who have formed them.' The court cannot add to or detract from the law they have made for themselves, or say that the promissory warranty shall not be enforced because it is not material. It is enough that the parties agreed to it. However foolish, improvident, or immaterial it may be, it must be substantially complied with.

"In this case the clause has been violated. It has not been substantially complied with. It is no compliance, in substance, by the assured, with his promise to place his books in his iron safe 364 days out of 365 days in the year, if the day on which the property was burned was the day in the year on which the books were not placed in the iron safe, nor is it in compliance, in substance, to place only the invoice-book, showing the purchases, and leave out the books showing the sales, both for cash and on credit, the daily transactions, and a copy of his last inventory of stock. The invoice-book was of no service

alone. . . . Nor is it a defense to say that the evidence of the loss is conclusive, and is supplied from other sources. The assured promised, in case of loss, his books showing his business should be subject to the inspection of the defendant, and the defendant relied upon the production of the books, to furnish them with the exact extent of loss. Plaintiff has failed to comply with his promise, failed to supply the evidence required in the policy, and he cannot now be permitted to prove his loss by other evidence, however conclusive."

II.

Among other things, the defendant set up as a defense in this action the failure of plaintiffs to comply with the "iron-safe clause" of the policy sued on, in which the plaintiffs covenanted and agreed to "keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and on credit." Before plaintiffs can recover, they must show, either that they complied with this provision of the policy, or that the defendant waived its right to have it complied with. No waiver is alleged in the complaint, nor relied upon in the trial court. In order to ascertain whether or not plaintiffs complied with this provision of the policy, so as to be entitled to recover, it is first necessary to determine what the plaintiffs were required to do.

In *Pelican Ins. Co. v. Wilkinson*, 53 Ark. 352, the "iron-safe clause" of the policy identical with the one in this case was construed, and the court there gave a clear ex-

planation of the meaning of the clause contained in the policy sued on, that the "assured covenants and agrees to keep a set of books showing a complete record of the business transacted, including all purchases and sales, both for cash and on credit." In that case, the Supreme Court of Arkansas among other things, said:

"While it may be that, being a country merchant, whose system of bookkeeping was known to the appellant, he was not required to keep a full set of commercial books, yet it was his duty to comply with the agreement contained in the policy. This the contract required as a condition upon the performance of which his right of recovery depended. (May on Ins., §§ 156, 184.) The books kept by appellee were not destroyed. He testified that he kept a credit- or sale-book, showing all credit sales; that he kept a cotton-book, showing all cash and goods paid for cotton; that he kept a cash account, showing all cash taken in, and copies of bills of purchase, showing all goods purchased; that his last inventory was taken on the 1st of April, 1888, and showed the value of the stock on hand to be $1,811; that he estimated that goods to the value of $1,874 were destroyed by fire. The books and papers were all exhibited to the jury, except some invoices which had been lost. Appellee testified that he kept a merchandise account and a cash account, which are copied in the bill of exceptions, and it appears that at the end of each month he entered the amount of purchase during the month, and that he kept a book in which he entered each day his cash sales, and that at the end of each month he entered the aggregate amount of cash received on his books. We give a specimen of the manner in which the books were kept: 'Page 202. Taylor, Duffee & Co., Memphis, Tenn., 1887, June goods, $855.01;

July goods, paid $435.96. . . . In the stock at the 1st of June, 1887, up to April 1st, 1888, page 203, W. Y. M. Wilkerson, 1887, to June, to money taken in, $40. July, to money taken in, $90. Paid Taylor, Duffee & Co., paid June $10, one bale of cotton that was lost in 1886, $42. September, to money taken in $40,' etc. It is impossible to obtain any correct or satisfactory idea of the amount of goods on hand and destroyed by fire from this mode of bookkeeping. For aught the books show, goods of the value of $400 may have been sold for $40, as the items are not given, but only the aggregate amount of sales."

We think the plaintiffs in this case have utterly failed to show a compliance with the provisions of the clause of the policy in question as thus construed. They really kept no record of their business at all. We invite a careful consideration of the testimony of plaintiffs in this case. Mr. Kearney, in answer to questions put by Mr. Cruce, stated that his books showed a complete record of his business, including cash and credit sales. He also testified that the proof of loss which he had furnished the company contained a statement showing the amount of cash sales and credit sales, and the amount of purchases from the last inventory taken before the fire. But when he undertook to analyze his system of bookkeeping on the cross-examination, he showed affirmatively a failure to comply with the provisions of the policy. On the cross-examination, Mr. Kearney testified that the only book of original entry kept by his firm was what he calls a "day-book," and

that the cash-book and ledger were made up from entries taken from the day-book, and that they, together with what he calls his note-book, were all the books he kept.

Proceeding, he testified as follows:

Q. And now, that I may understand the facts about the matter, this day-book contained all the transactions of that store during the day's business? A. Yes, sir.

Q. From this, this ledger was taken and made up? A. And this other book here.

Q. You have the note-book you spoke of? A. Yes, sir.

Q. These are the books that constitute the memoranda or evidence of your business done in that store? A. Yes, sir.

Q. Now, does that day-book, which I hold before you, show the cash sales and the credit sales of the day? A. I don't think it did up to the time we burned.

Q. It didn't show the sales made during the day? A. It shows all the sales, but has to be taken up.

Q. How is that? A. It had to be taken from that.

Q. What did? A. The sales, the cash sales.

Q. You say this does not show the cash sales during the day of that business prior to the time of the fire? A. Why, yes, I think it does. The old cash-book is there to show.

Q. Does that day-book right here—does it show, Mr. Kearney, the individual cash sales made each day in that store prior to the fire? A. Separate from the other.

Q. What other? A. The credit sales.

Q. Does it show the individual cash sales? A. It shows all the business—yes.

Q. Does this day-book show the individual cash sales? I am talking of that particularly. Does it show the indi-

vidual cash sales made at your store during each day? A. We kept that book, and we got everything from it.

Q. You can answer me yes or no. Does that day-book show the individual cash sales of that store during each day? A. The way we kept it—yes, I think it would.

Q. I will ask you for that answer, please. A. That is all the books we kept, and all the way we kept them.

By Mr. Crnce: I think the books show whatever is the condition.

By the Court: I think it fair for counsel to examine with reference to whether it contains the entire record of the business.

Q. I will ask you if this day-book shows each individual cash sale of the goods of the day? A. It shows the sales of cash altogether.

Q. If a man came into your store to buy a hoe and it was $1.25, and it was on Tuesday—say John Doe came into your store on Tuesday and bought a hoe and paid $1.25 for it, would that go on the book? A. No, sir; it would go down in the cash drawer.

Q. Then the individual cash sales would not appear upon that book? A. That is not the way we kept it. We take it in and make up the cash from the drawer at night.

Q. Yet this is the only record you have or ever had of the cash sales made each day? A. Yes, sir.

Q. At night you would count the cash in the drawer, and then you would put in the day-book the collections of sales and the total amount as so much money? A. Yes, sir.

Q. That was the only record you ever had of the cash sales made each day or made at all? A. Yes, sir.

(Record, 20, 21, 22.)

Mr. Kearney also testified as to the purchases made by his firm, that his books only showed the totals of the bills of goods as they were purchased, and nowhere con-

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tained an itemized statement of the goods purchased by him. (Record, 20.)

He further testified that his firm kept no profit-and-loss account. (Record, 23.)

While Mr. Wyse, the other plaintiff, in the direct examination testified that his books showed the amount of cash and credit sales, yet, on the cross-examination, he shows a failure to comply with the clause of the policy in question even more clearly than is shown in the testimony of Mr. Kearney. After testifying that his firm kept no profit-and-loss account, that his book did not show the amount of goods in the warehouse separate from the amount of goods kept in the main building, and that from his books he could not tell the amount of goods in either building, he proceeds:

Q. This day-book you have here does not show anywhere the individual cash sales made during the day, does it? A. Not during the day—no, sir.

Q. And the only way you determined was at night to count the cash in the drawer, and at the bottom of the day's business the amount of cash was put down so much. Is that correct? A. That was our custom.

Q. That was the way it was done? A. Yes, sir.

Q. When the work of the day closed, did you simply count the money in the drawer and put down so much cash as representing your cash sales during the day? A. Sales and collections so much.

Q. Then the amount of money you would count in the drawer represented the amount of sales and collections for the day? A. Yes, sir.

Q. As a matter of fact, then, Mr. Wyse, you have no record of the exact amount of sales made each day, have you? A. Yes, the amount of sales shows on that book.

Q. If you should sell $20 worth of goods and a man should come in and pay you $70, your cash-book would show the amount of sales and collections, $90? A. Yes, sir.

Q. There would be nothing to show how much cash sales there were, and how much collections there were? A. Yes, sir.

Q. Sales and collections so much? A. Yes, sir. If you wanted to know them separately, just deduct the credit sales from the cash sales, and you would see how much there was.

Q. The only record kept was the sales and collections? A. The credit sales.

Q. When this book simply shows the credit sales made during the day, and then at night you put down this memorandum of cash and collections, so much in money? A. Yes, sir.

Q. If you wanted to know what the credit sales were, the book would show for itself? A. Yes, sir.

Q. How could you tell what the amount of cash sales were when the total amount in the drawer would be put down only? The total amount of money? A. If we wanted to know what the credit sales were, just refer to the day's business.

Q. I am not talking about the credit sales. You said the cash sales and collections so much? A. Yes, sir.

Q. If the cash sales were $20 and the collections were $70, then the item on the book would be, cash sales and collections, $90? A. Yes, sir.

Q. Then would you have any evidence to show what were the cash sales and what were the collections? A. If

we wanted to determine it, I would turn to the bills receivable.

Q. Would this book show how much cash sales were made that day, and how much collections, this day-book you keep? A. Yes, sir, it would show.

Q. Will you find it for me? This day cash sales and collections $79.25. Tell me how much cash sales? A. I would have to refer to this book to see what the cash and collections were.

Q. Does it show what the cash sales were aside from the collections? Can you tell from that book what the amount of cash sales were on any particular day? A. Yes, sir.

Q. Tell me what the sales were on this day, $79.20 call it. A. It says cash and collections.

Q. Did n't you say a moment ago that you could not tell from that book itself the amount, that you would refer to some other book? A. The cash-book; if there was any error, we would catch up with it on the cash-book. If there were any credit sales, they show on there.

Q. We are not talking about credit sales, Mr. Wyse; we are going to get that point out [hands witness book]. Now, there is an item, Mr. Wyse, of cash collections and sales. Will you tell me from that book what the sales were on that day? A. I can get mighty close to it if you will give me a pencil so I can figure it out.

Q. Can you tell from that book what the cash sales were on that day?

[Witness has pencil and figures.]

Mr. Quinton: I submit that it should be answered.

By the Court: If he can figure it out and tell it—

A. I think I can do so.

Mr. Quinton: This bookkeeping is guaranteed and covenanted to be in a certain way, and the question is, whether

the witness has kept the books in that certain way. A. I did not keep the books. I am not an expert bookkeeper. There may be some of these entries I don't understand exactly now.

Q. Now, Mr. Wyse, that I may be understood by the court and jury both, you state that this item here in this day-book, cash collections and sales, was put there from the amount of money you had in the cash drawer at night. Is that correct? Did n't you testify, and did n't Mr. Kearney testify, that you counted the cash in the drawer at night, and from the amount you had there you would make a memorandum on the book of collections and sales for that day, so much money. Is that true? A. Yes, sir.

Q. Now, that is the only place from which you did get that amount, is it not—the amount of money you had in the cash drawer? A. And entries through the day.

Q. Does that represent the amount of credit sales? A. No; there may be still credit sales in there; there may be sales and collections.

Q. There would not be credit sales and collections made that day? A. If there were any collections made on that day, they were counted in.

Q. And the cash sales were counted in there made that day? A. Yes, sir.

Q. Then the amount represents both the cash sales and collections and not the credit sales made on that day? A. Yes, sir.

Q. Can you tell me from that amount how much cash sales and how much collections on that day? A. I believe I can tell.

Q. I will ask you this question: Do you know from that item there how much the cash sales and collections were on that day? A. Yes, sir.

Q. Do you know from that entry how much was cash

sales and how much was collections? Do you know from that what the cash sales were for that day, from this $54.86? A. I think I do.

Q. Do you know from this entry, Mr. Wyse, cash sales and collections $64.85, from that entry, just how much was cash sales and how much was collections? Just look at that single entry. A. No, sir, I don't.

(Record, 30–33.)

Mr. Wyse also testified that he nowhere kept any books showing a complete statement, with the items, of the amount of his purchases. From the testimony of the plaintiffs, it appears that no effort was made to comply with the provisions of the policy requiring a record of all their business transactions to be kept. Their method of keeping an account of their business furnished the very opportunity for fraud which the defendant had endeavored to protect itself against in the policy. Suppose, for instance, $100 worth of goods had been sold on a given day for cash, and $75 of it had been put in the pocket of either Mr. Kearney or Mr. Wyse, or one of their clerks, instead of in the cash drawer, when they came to make the memoranda that night in what they call their day-book, no record would ever appear of the goods represented by the money pocketed.

This is true, not of one day alone, but of every day. They kept no record whatever of cash sales, and made no pretense that individual items sold through the day for cash were entered in any book; or that any book contain-

ing such entries was kept or produced to the insurance company.

Thousands and thousands of dollars' worth of goods were sold for cash without any record whatever being kept of it, except the amount found in the cash drawer at night, which would not show even the total amount of cash sales on any day, unless it so happened that on the particular day, no collections were made, and no money was paid out for current expenses. It would be miraculous if the money in the drawer at night would represent the cash sales on any day, and yet, *the amount of money in the drawer at night*, depleted every day by the amount paid out for current expenses, and augmented by the amount of collections, without any account being kept of either, furnished the only entries, which made up the record of the cash sales, kept by plaintiff. The requirement of the policy was wholly ignored. There is no conflict in the testimony on this subject, and the evidence does not present a question of partial or substantial compliance with the contract by which plaintiffs had obligated themselves to "keep a set of books showing a complete record of the business transacted, including all purchases and sales both for cash and on credit," but it shows a total disregard of that obligation, so far as their cash sales were concerned.

Defendant had contracted for better bookkeeping than is shown. It had contracted as a condition precedent to any liability that plaintiffs must keep and exhibit an item-

ized record of their cash sales. In *Pelican Insurance Company v. Wilkinson*, cited above, the Supreme Court of Arkansas, say: "For aught the books show, goods of the value of $400 may have been sold for $40, as the items are not given, but only the aggregate amount of the sales."

The items of cash sales were not kept by Kearney and Wyse, and the aggregate amount of sales was not kept, the *amount of money in the drawer at night* varying each day with the amount of collections and the amount paid out for expenses.

In Ostrander on Fire Insurance, 2d edition, 553, it is said:

"Should a record of the credit sales presented and the sales for cash omitted, the inventory and the record of purchases and credit sales will all be useless, for there is still a wanting in the chain of evidence, without which all the other facts can serve no important purpose. It is like a bridge across a stream with one section gone. We cannot pass."

With the invoices of the goods purchased and the last inventory of their stock destroyed, how was it possible for the plaintiffs to make from the books an accurate statement of the goods burned? There is not a syllable of testimony to show that the books of the plaintiffs contained a single item of the goods on hand in the store at the time of the fire. We ask the court's particular attention to this point. Only three, or at most four books, were kept by the plaintiffs—their day-book, cash-book, ledger, and

possibly a note-book which contained a list of notes taken from parties to whom they sold goods on a credit. It is not pretended in the testimony of either of the plaintiffs that they had any book which contained their invoices of goods purchased or an inventory of the articles in the store at the time of the fire. They claim that they had an inventory showing a list of the articles on hand in January preceding, but that this inventory was destroyed by fire. We repeat, how is it possible on such a showing for the plaintiffs to produce from the books an accurate account of the goods destroyed by the fire? Mr. Wyse, in his testimony, furnished the answer to this question. On page 34 the following occurs in the cross-examination of Mr. Wyse:

Q. Have you got any books or records showing the amount of what your last inventory was? A. No books.

Q. Then from what do you get the statement of what the amount of your last inventory was in January, 1894? A. We have got the books but not the inventory.

Q. Have you got the books? Have you got any books showing the amount of what your last inventory was in January, 1894? A. No books.

Q. How can you make a statement of that amount of that inventory? A. We sent to R. G. Dun & Co., and it was taken from our invoice they had.

Q. Are you testifying to the amount of the inventory of January 1, 1894, from the report of R. G. Dun—what they had down; what you had reported to them? A. Yes, sir.

RE-DIRECT EXAMINATION.

Q. I believe you stated you made the statement to R. G. Dun taken from this inventory. Is that correct? A. Yes, sir.

Q. Since the fire you have sent to R. G. Dun and got a copy of it? A. Yes, sir.

We tried to get rid of this testimony—moved to strike it out; and our eleventh assignment of error is founded upon the refusal of the court to exclude from the jury this testimony.

It thus appears that the proofs of loss were not procured from the contents of the books, or of the record kept of the business of Kearney & Wyse, but from a copy of the old inventory which they had sent, fourteen months before, to R. G. Dun & Co.

If the books of the plaintiffs contained a record of their business as required in the policy, why send to R. G. Dun & Co. for the invoice furnished them so long before the fire? This testimony shows that the contention of the plaintiffs that they have complied with the policy is utterly unfounded. They were permitted to recover in this case in total disregard of the provisions of the policy. This testimony also shows that the proof of loss as contained in the record is a genuine piece of guesswork. Having kept no account of the items of daily sales, how could the plaintiffs in this case, from an invoice made fourteen months before the fire, produce an accurate statement of the goods lost? The proof of loss so far as it purports to

have been made from the books or the records kept by the plaintiffs of their business is a fabrication pure and simple. It is in line with the testimony of the plaintiffs in this case on their direct examination, when they stated that their books showed a complete record of their cash and credit sales.

In the Court of Appeals for the Indian Territory, defendants in error insisted that it did not appear that the record contained all the evidence; but we insist that the record in this case contains all the evidence, and that this appears from the bill of exceptions. It is shown by the record that the testimony was taken down by the official stenographer and afterwards transcribed by him. The bill of exceptions purports to contain all the questions and answers of the witnesses. On the first page of the bill of exceptions the following recital occurs: "And the plaintiff, to make issues on his part, introduced the following witnesses, who testified as follows." The direct and cross-examination and the redirect examination of every witness purports to be given in full. At the conclusion of the examination of the witnesses, page 44, the following announcements were made: "Plaintiff rests;" "Defendant rests." All the papers referred to in the testimony of the witnesses are shown in the record as a part of the bill of exceptions. Upon such a record we think the court should presume that it contains all the evidence.

The correct rule is announced in the case of *Liggett v. Grinnett*, 36 Ark. 496, as follows:

"It is not expressly stated in the bill of exceptions that it contains all the evidence introduced at the trial, but such is to be inferred from its general tenor. It sets out the evidence that was introduced by the parties, and that offered and excluded, whereupon the case was submitted."

In *Everett v. Clemens*, 9 Ark. 478, it is said:

"A bill of exceptions taken on the court's refusal to grant a new trial must necessarily show that it contains all the evidence introduced in the cause; but it is not necessary that it should avouch in express words that this is all the evidence in the case. It is sufficient if it appear from the language used that the whole evidence was given. The bill of exceptions here, after setting forth the evidence of two witnesses, says: 'Upon this evidence the parties submitted the case to the court.' This language certainly excludes all idea of any other evidence having been given, and clearly imports that it is all the evidence before the court on the trial."

Moss v. State, 17 Ark. 331.
Daniel v. Crosby, 19 Ark. 443.
Seriath v. State, 35 Ark. 412.
Thomas v. Hinkle, 35 Ark. 450.

III.

The second, seventh and tenth assignments of error relate to the exceptions taken on the trial to the admission of the testimony of plaintiffs to the effect that the proof of loss furnished by the plaintiffs showed the total amount of cash and credit sales and the amount of their

purchases since the last inventory was taken before the fire, and that the books kept by the plaintiffs showed the total amount of their cash and credit sales, and we ask the court to consider them together. Proofs of loss are not admissible to prove their contents.

IV.

The 15th and 16th assignments of error relate to the refusal of the court to charge the jury in the very language of the policy sued on, and to define the effect of the plaintiffs' refusal or failure to comply therewith. If the iron-safe clause of the policy sued on was valid and the plaintiffs were bound thereby, this charge should have been given. The refusal to give this charge amounted to a complete exemption of the plaintiffs from any obligation under this clause of the policy.

There are many other reasons that may be urged for a reversal of the case under the exceptions taken on the trial. We think we have shown that by the admission of the evidence objected to on the trial, the charge given by the court, and the requested charges refused, plaintiffs in this case have been permitted to recover upon a contract wholly different from the one contained in the policies, and that the trial court substituted an entirely different contract, which exempted the plaintiffs from the performance of the

conditions imposed upon them in the contracts sued on. The court exempted the plaintiffs from the obligation to keep the set of books as required in the policies, exempted them from presenting to the insurance company the inventory which the policies required them to present, and permitted them to recover, after a strenuous effort on the part of the defendant in the court below to enforce its contract against the plaintiffs. The plaintiffs in their complaint claimed no release or discharge of the obligations, and pleaded no waiver on the part of the defendant of any condition in the policies. In the opinion of the trial court, no claim of exemption from the obligations, nor waiver of the defendant's right to enforce them, were needed. The counsel for plaintiffs and the trial court seemed to proceed on the idea that the contract sued on was an exacting one which plaintiffs were unable to comply with, and a new one had to be substituted, and we respectfully submit that the substitution was complete, and a new contract, born during the trial of the case, was vigorously enforced against the defendant.

Respectfully submitted.

QUINTON & QUINTON,

Solicitors for Appellant.

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Of Counsel.